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No. 417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY GEORGIOU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 22, 1964.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A, hereto, *infra*, p. 15, is reported in ..... F. 2d .....

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 22, 1964, *infra*, p. 21. A timely petition for rehearing was denied on July 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Question Presented

Whether the opinion of this Court in *Sherman* v. *United States*, 356 U.S. 370, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958) permits a defendant claiming entrapment to ask the purported entrappers whether it was their plan to "induce" or "persuade" the defendant to commit the crime charged, and therefore, whether the Court of Appeals and the District Court erred in limiting the cross examination of the purported entrappers by not permitting the defendant to ask whether they planned to "induce" or "persuade" the defendant to commit the crime charged.

Statement

The petitioner, Anthony Georgiou, was indicted by the January, 1963 Grand Jury of the Northern District of Illinois, Eastern Division, for the crime of unlawful possession of certain metal plates with intent to use such plates in counterfeiting the Dollar Silver Certificates, in violation of Section 474, Title 18, United States Code. (App. 4.) He was tried by a jury before the Honorable Bernard M. Decker, United States District Judge. The jury found the petitioner guilty as charged in the indictment and he was sentenced to commitment to the custody of the Attorney General for a period of six years. (App. 1-3, 17, 19-20)

The petitioner, Anthony Georgiou, was a man of previous good reputation for being a peaceable and law-abiding citizen, who lived with his wife and family in Skokie, Illinois. (App. 128, 129, 130, 131, 132) He operated an automobile sales business known as Don's Motors at 3203 North Western Avenue, Chicago, Illinois. (App. 32, 54)

Thomas Mosley, a sometime Chicago Transit Authority bus driver, sometime tow-truck driver had a conversation with Georgiou, on November 8, 1962. (App. 80) The two had known each other in the past. (App. 110) Mosley was wearing his uniform as a bus driver which Georgiou had never seen before and the two commenced a conversation concerning the steady salary of bus drivers. (App. 80) With that Mosley made the statement to Georgiou that one way to make money was indicated by a bulletin which he had seen in the CTA bulletin board concerning counterfeit bills. (App. 80) Georgiou asked Mosley if he wanted to buy counterfeiting plates and said that he knew somebody who had counterfeit plates months previous. (App. 80)

Mosley indicated an interest and Georgiou told him that the party wanted five thousand dollars. The conversation ended with the understanding that Mosley was to call Georgiou if he wanted the plates. (App. 80)

On November 12, 1962, at 2:00 or 2:30 A.M. Mosley called the Secret Service. On November 14, 1962, at the offices of the Secret Service and at their behest, Mosley again made contact with Georgiou. (App. 84) The Secret Service agents had been skeptical of the story Mosley had related to them. (App. 119) The Agent in Charge had asked Mosley, "Do you mean that this man that you know —you don't know of him having a criminal record—out of the clear blue sky he has asked you or offered you for sale counterfeit plates?" and turning to the other agents present, Burke, the Agent in Charge, said, "It is unbelievable that someone would offer for sale counterfeit plates." Mosley then told the agent that he didn't know anything about Georgiou except that he was a respectable business man. (App. 120) Burke then said, "You mean that that is all that you know of this man and he told you that he could give you counterfeit plates?" With that the Secret Service Agents directed Mosley to place a call to Georgiou. (App. 120) The conversation was brief. Mosley who was known to Georgiou as Art Rickoff, said, "This is Art. I wanted to know if our deal was still going on in regard to those counterfeit plates." Georgiou said, "Yeah, I just haven't seen the guy." The two then agreed that Mosley should meet Georgiou at the latter's office in an hour. (App. 80) Before going to Georgiou's office, Mosley went to the Belmont National Bank where he met Georgiou by accident. (App. 84) Mosley said to him, "I am sorry to be pressing you on these plates; my party is after me for these plates; wants to know whether the deal has gone through or whether I am being set up by a con man for a stick up. What is the story on it? I quoted my party

a price of $7,000; I get $1,000 and you get $1,000." (App. 84) Georgiou said that he would have to contact this man. The terms of the delivery would be $7,000, he would take $5,000, put it in the trunk of Mosley's automobile, drive the car to his contacts who would place the plates in the trunk of the automobile and he would return. (App. 85) Georgiou asked Mosley if he could use counterfeit currency and the two had a conversation concerning counterfeit currency and ways of disposing of it. (App. 85)

After this conversation with the petitioner on November 14, 1962, Mosley informed Agent Motto of the Secret Service who told him to go ahead with the arrangements to set up a meeting with Motto, Georgiou and Mosley. Motto was to be introduced to Georgiou as Nick Spina, Mosley's buyer from St. Louis. (App. 85)

On November 25, Mosley and Georgiou again had a conversation about the plates, this time at Georgiou's office. (App. 86) Mosley said to Georgiou, "My people from St. Louis, they are people who do nothing but deal in this type of business. This is their business, counterfeit money. They are pressing me. They want to know whether or not I am handing them a line or whether or not I can produce these counterfeit plates." (App. 86)

Georgiou told Mosley that he had not seen the party. Georgiou said, "There can't be any slipup in this. These people are very rough people." Mosley replied, "Well, if I ever get these plates I can guarantee you they will never go into action, they will never go into action around Chicago." (App. 86) Then they began talking again about counterfeit money. (App. 87).

On December 29, 1962, Mosley was called by Agent Bolden of the Secret Service and asked to come downtown to the Secret Service office. When Mosley arrived there the agents

wanted to know why there was a delay in getting the plates. (App. 87) Burke, the Agent in Charge asked Mosley if he thought that Georgion was trying to set him up for a stick-up. (App. 122) At that point the agents were not sure whether Georgion had the plates or not. (App. 122) Burke asked Mosley whether he had seen Georgion. Mosley replied that he had not seen him since November 25 (App. 87-88), and related the following conversation to the agents: "When we left, after I had told Tony that my party was in St. Louis, I said, 'My party is in St. Louis. In fact my party is going to meet me down here. I want to introduce him to you.' He decided then that it was time to get out. He didn't want to see my people, I wasn't to see his people. With that he locked the door. We were on the sidewalk. He reached across and shook hands with me, looking up and down the street with his fist closed. I said, I told Tony, 'If we score on this job, we will score again. You don't have to worry about me, Tony, I am not worried about you'." (App. 88)

After relating this conversation to the Secret Service, Mosley was told by Burke, "Why don't you hit his place again? Call his place of business. See if he is there. See what his attitude is." (App. 88) Mosley thereupon went directly to the petitioner's place of business where the petitioner informed him that he would have the back plate for inspection by Mosley's party. (App. 89) Georgion outlined the terms of the transaction and, when Mosley indicated agreement to the terms, told Mosley to call in a few days and to keep calling until Mosley was able to reach him. (App. 89)

With this information Mosley went to the Secret Service and spoke to Agent Motto. (App. 89) On January 3, 1963, Mosley called the defendant's place of business and was

told by a person by the name of Anthony Mellocino that the deal was ready. (App. 89) While Agents Motto and McCleod kept the place under surveillance, Mosley went to the petitioner's place of business and produced from him the back plate. (App. 94) He then met the Secret Service Agents, showed them the plate and made arrangements to complete the transaction the next day. (App. 95) The next day Mosley and Agent Motto went again to the defendant's automobile lot. (App. 95) Other agents and police officers were covering the area. (App. 43) Motto was introduced to the defendant as Nick Spina from St. Louis. (App. 96) The three men left the automobile lot and went to a corner restaurant where the deal was completed (App. 96-97). Georgiou and Mosley then drove to the vicinity of Chicago Avenue and Cicero Avenue in Chicago. (App. 100) Georgiou dropped Mosley at that corner (App. 101), and was not seen by Mosley for about fifteen minutes. (App. 102) Mosley again entered the automobile and the two returned to the petitioner's automobile lot. (App. 102-103) When they arrived the petitioner took a package out of his truck and brought it into the office. (App. 103) Motto demanded to inspect the package and he and Georgiou went into the washroom. (App. 34) Motto tore off a corner of the package and observed the plates. (App. 35) At that time the other Agents and Chicago Police Officers broke into the petitioner's office and placed all under arrest. (App. 35)

Reasons for Granting Writ

The Court of Appeals in this case without really deciding the question at all, except in one of those all too prevalent statements that it considered the petitioner's other claims and found them to be without merit, has caused a result completely contrary to an opinion of this Court in a controlling case. The controlling case is *Sherman* v. *United States*, 356 U.S. 370; 78 S.Ct. 819, 2 L.Ed. 2d 848. (The opinion of the Court is contained in Appendix C hereto, *infra*, p. 22.)

In that case the Court decided as a matter of law that the petitioner therein had been entrapped. The evidence upon which that conclusion was based was set forth in a footnote to the opinion and is as follows (*Sherman* v. *United States*, 356 U.S. 369, 374, n. 2):

> Q. And it was your [Kalchinian's] job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?
>
> * * *
>
> A. No, it wasn't my job at all to do anything of the kind.
>
> Q. Do you remember this question [asked at the first trial] . . . Q. And it was your job while working with these agents to go out and try to induce a person to sell narcotics to you, isn't that correct? A. I would say yes to that. Do you remember that?
>
> A. If that is what I said, let it stand just that way.
>
> * * *
>
> Q. So when you testify now that it was not your job you are not telling the truth?
>
> A. I mean by job that nobody hired me for that. That is what I inferred, otherwise I meant the same thing in my answer to your question.

From that portion of the record in particular this Court reached the conclusion that the petitioner there had been entrapped.

In the present case the petitioner attempted to cross examine the informer and the Secret Service agents using what are for all practical purposes identical questions to those which were used in cross examining the informer in the *Sherman* case. The proceedings are as follows:

The following is from the cross examination of Agent Strong (App. 61-65):

> Q. At that time was there a plan conceived whereby Mr. Mosley was to bring Mr. Motto who was to pretend that he was an automobile buyer and also interested in getting counterfeiting plates—counterfeit plates?
>
> Mr. Joyce: I will object to the form of that question.
>
> The Court: Objection sustained.
>
> By Mr. Bellows:
>
> Q. Was there any conversation in which Mr. Mosley and Mr. Motto were to try to persuade Mr. Georgiou to get counterfeit plates?
>
> Mr. Joyce: Oh, your Honor, I think that this—
>
> The Court: You may ask him what the conversation was.
>
> Mr. Bellows: Your Honor, I respectfully submit, and with all due respect to your Honor, I don't want to do that, I want to direct it to a particular question that I have in mind. I think that your Honor may guess what I have in mind.
>
> The Court: I will permit you to ask the last question to direct his attention to whether there was any conversation relating to this particular matter.
>
> By the Witness:
>
> A. Would you repeat the question.
>
> Mr. Bellows: Mr. Reporter, would you repeat the question.
>
> (Question read by the reporter.)
>
> The Court: "Try to persuade?"
>
> By Mr. Bellows:
>
> Q. Was there any conversation in which Mr. Mosley and Mr. Motto were to induce Mr. Georgiou to obtain counterfeit plates for them?

Mr. Joyce: I would object to that also, your Honor; the word "induce."

The Court:—Objection sustained.

Mr. Joyce: That is Mr. Bellows' imagination.

Mr. Bellows: Pardon me!

The Court: You may ask him if there was any conversation relating to the plates. To put words into his mouth such as "induce" or "persuade" or to characterize it yourself by the question, that I think is improper.

Mr. Bellows: Your Honor, maybe I don't understand cross examination but I thought that I have a right to ask questions—

The Court: You do.

Mr. Bellows: —based on my theory of the case.

The Court: Yes. But not to state in the question itself characterizations such as the use of words that you are using such as "persuade" or "induce."

Mr. Bellows: How else—I don't want to appear—

The Court: You may ask if there was any conversation relating to these plates.

Mr. Bellows: All right.

The Court: And then you may ask him what conversation there was. You may then ask what it was. It is the form of your question.

Mr. Bellows: But, your Honor, I submit that I have a right to ask—again, your Honor is the Judge and I am just a lawyer, but—

The Court: I am going to permit you to ask any questions and direct his attention to the conversation—

Mr. Bellows: Your Honor, this witness is a hostile witness and he is a witness for the Government. I don't want to ask a question relating to a conversation.

Mr. Joyce: I object to the "hostility" of this witness.

Mr. Bellows: I would like to find out whether a certain conversation took place. I may put it in a way that he may say—

The Court: You may argue the question whether this was inducement, persuasion or whatever it was later on after you find out what the conversation was, if there was a conversation.

By Mr. Bellows:

Q. Without telling us what the conversation was, was there a conversation between you and the other agents and Mosely about counterfeit plates?

A. Yes, sir.

Q. And was Mosely instructed to meet with Mr. Motto on January 4 and go to Mr. Georgiou's place of business?

A. Yes, sir.

Q. And was it also planned at that time that Mr. Mosely was to introduce Mr. Motto as a man by the name of Nick from St. Louis?

A. Yes, sir, as far as I know.

Q. Will you speak a little louder.

A. Yes, sir.

Q. Also, it was conceived at that time that Mr. Motto and Mr. Nick were to ask Mr. Georgiou to get counterfeit plates for them, isn't that right? Just answer yes or no.

A. No.

Mr. Joyce: Objection.

The Court: Objection sustained.

Mr. Joyce: I will withdraw the objection.

The Court: All right.

Mr. Joyce: That question cannot be answered yes or no, your Honor.

Mr. Bellows: Well, your Honor,

The Court: "It was conceived at that time . . ." He has answered the question "no," so rephrase the question.

The following is from the cross examination of Mosley (App. 120-121):

I made an appointment with Mr. Georgiou to meet him. Mr. Georgiou said to meet him at his office. I met with him; I went and met him.

Q. And the effort was to see if you couldn't induce Georgiou to get some plates for you, isn't that right?

Mr. Joyce: Objection.

The Court: The objection is sustained.

The following is from the cross-examination of Agent Motto (Tr. 65):

> Q. Wasn't Rickoff or Mosley instructed to see if he couldn't prevail on Mr. Georgion to get some counterfeit plates?
>
> Mr. Joyce: Objection, your Honor.
>
> The Court: I think that we are far afield. Objection sustained.

In each of the illustrated incidents counsel for the defendant was attempting to prove entrapment by the government.

Certainly there can be few other ways to elicit from a hostile witness the fact that he was trying to induce the defendant to commit a crime. In large part the test laid down in the *Sherman* case and in *Sorrells* v. *United States*, 287 U.S. 435, as to entrapment is one of the state of mind of the government agents.

> The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at page 442. 356 U.S. at page 372.

The questions which counsel attempted to ask all bore upon the issue of whether the criminal design originated with the defendant or the government agents. Certainly motive of a witness in doing certain things to which he testified on direct examination is always the proper subject of cross examination. *Runde* v. *Manufacturers Casualty Ins. Co.*, 2 Cir., 178 F. 2d 130, 132.

The motive of the Government was deemed to be the controlling factor in both *Sherman* and *Sorrells*. In fact, the Court in *Sherman* reached its conclusion that the defendant had been entrapped even though the Government was able to show some history of narcotics violations. In so doing, the Court evidently reached its decision on the basis of the Government's conduct.

We grant that this question does not contain a broad problem vital to the nation such as civil rights, legislative reapportionment or monopoly power. However it does pose a question of great concern to many, and that is the question of how far the Courts of Appeals may go in failing to follow the opinions of this Court in the more mine run of the cases which come before them. An election will not turn on the Court's decision in this case but it is important to the petitioner Anthony Georgiou that he be granted a trial in which so fundamental a right as cross examination of the witnesses against him is guaranteed. It is unfortunate that he must seek the aid of this Court in procuring that right. It should have been granted to him in the first instance by the trial court. It should have been granted to him by the Court of Appeals. In each case those courts in what one may almost sense a haste to convict refused that right, and so it has become necessary to present this petition. We submit here that the problem presented in this case, the problem of the general supervision of the administration of criminal justice, has been permitted to remain too long the province of the Courts of Appeals and we pray that this Court turn its attention to the more mundane but no less vital subject of guaranteeing to those accused of crime a trial free from prejudicial error.

Conclusion

For the above and foregoing reason we respectfully submit that a Writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Opinion of the Court Below)

In the

United States Court of Appeals

For the Seventh Circuit

No. 14409 SEPTEMBER TERM, 1963—APRIL SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTHONY GEORGIOU
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 22, 1964

Before HASTINGS, *Chief Judge*, and CASTLE and KILEY, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant Anthony Georgiou appeals from a judgment of conviction, following a trial by jury, for violation of Title 18 U.S.C.A. § 474.[1] He was

[1] "§ 474. Plates or stones for counterfeiting obligations or securities.

* * * * *

"Whoever has in his control, custody or possession any plate, * * * made after or in the similitude of any plate, * * * from which any such obligation or other security [of the United States] has been printed, with intent to use such plate, * * * or to suffer the same to be used in forging or counterfeiting any such obligation or other security * * *;

* * * * *

"Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

charged in an indictment with the crime of unlawful possession of certain metal plates with intent to use such plates in counterfeiting One Dollar Silver Certificates.

The sole issue before us on this appeal is whether defendant was entrapped by Agents of the Secret Service into committing the crime of which he was found guilty.

By invoking the defense of entrapment, defendant admits commission of the offense charged in the indictment.

The contested issues of fact and credibility of witnesses bearing on the defense of entrapment were resolved by the jury's verdict. We accept the result as we would a similar determination made by a trial to the court without a jury. *United States* v. *Jones*, 7 Cir., 302 F. 2d 46, 47 (1962); *United States* v. *Perkins*, 7 Cir., 190 F. 2d 49, 51 (1951).

Considering the evidence in the light most favorable to the Government, the jury would have been warranted in finding the following factual situation concerning the issue of entrapment.

Defendant was a family man residing in Skokie, Illinois. He operated an automobile sales business in Chicago. Thomas Mosley was a bus driver for Chicago Transit Authority and also was a tow-truck driver. Defendant and Mosley had known each other for some time.

On November 8, 1962, defendant and Mosley met and engaged in conversation. No one else was present. Mosley was dressed in his bus driver's uniform which defendant then saw for the first time. The conversation began with talk about Mosley's salary as a bus driver. Mosley said there were other ways of making money, in response to defendant's statement that his [Mosley's] salary of "$150 a week is not much." In answer to defendant's inquiry,

Mosley casually mentioned a warning on the Transit Authority bulletin board "to be on the lookout for counterfeit one dollar bills." Mosley continued, "If that is making money, the fellows who are making these bills, they don't know which [side] is up."

Whereupon, defendant asked Mosley, "Say, you got some money, how would you like to buy a set of counterfeit plates?" Defendant said he had seen the plates about six months ago and that they were available then. Thinking these plates were the ones used for printing the counterfeit one dollar bills concerning which he had been alerted by his employer, Mosley told defendant he might be interested in them for an out of town buyer. Defendant replied that they wanted "five G's, five grand" for them. Mosley requested defendant to "see what you can find out for me"; and to "give me a call." Defendant answered, "You give me a call." The conversation ended at that point and the two men separated.

Four days later, Mosley telephoned the United States Secret Service office and reported he had some information regarding counterfeit plates. He made an appointment to talk to an Agent later that day. Mosley was unknown to the Secret Service at that time. He talked to Agent Bolden. Later, he went to the office of the Special Agent in charge and told of his conversation with defendant.

Mosley cooperated with the Secret Service and subsequently made several telephone calls to defendant and personally saw defendant and urged him to get the plates. Mosley quoted a price of $7,000 for the plates, of which defendant and Mosley each were to get $1,000. Arrangements were made for the delivery and payment

During one of these meetings prior to delivery of the plates, defendant offered to sell $30,000 of counterfeit money to Mosley.

During the intervening meetings between defendant and Mosley there was much talk by defendant about his difficulty in dealing with his "people." Defendant said, "This guy that gave me this plate, he is big people, he is mean people"; "don't let anything happen to this plate—this man has a gun to my head"; "there can't be any slip-up in this"; "these people are very rough people."

At one point in the negotiations, defendant asked Mosley which deal he wanted first, the $30,000 or the plates; that they were separate deals with separate people.

On January 4, 1963, the sale and purchase of the back plate was consummated. The arrest, indictment, trial and conviction followed.

The law applicable to the defense of entrapment in federal courts has long been established in the landmark cases of *Sorrels* v. *United States*, 287 U. S. 435 (1932) and *Sherman* v. *United States*, 356 U. S. 369 (1958). The standards laid down in these decisions have been followed by this circuit and all others. We need not review the many cases relating to them.

Entrapment has been defined to exist "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, *supra*, at 442. See 22 C.J.S. *Criminal Law* § 45(2) (1961).

The same acts may or may not constitute entrapment, depending upon the "conduct and predisposition" of the accused. See *Sherman v. United States*, *supra* at 373 and *Sorrells v. United States*, *supra* at 451.

Chief Justice Warren, speaking for the Court in *Sherman*, at 372-3, said:

> "However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. (Emphasis supplied.) See 287 U. S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence. See 287 U. S., at 451."

The Supreme Court, in *Sherman*, found as a matter of law that defendant was entrapped and held "that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Id.* at 377, citing in a footnote, *inter alia*, *United States v. Cronin*, 7 Cir., 150 F. 2d 382 (1945), cert. denied, 326 U. S. 756.

It requires little analysis of the record evidence in this case to say that the jury would have been amply justified in finding that defendant was not entrapped. Prior to reporting defendant's offer of the counterfeiting plates to the Secret Service, Mosley was unknown to the Agents.

Defendant's initial offer of the plates to Mosley was entirely unsolicited by Mosley. On several occasions, including their first reported conversation, it appears that defendant invited Mosley to "give me a call." Defendant's attempt to sell Mosley $30,000 of counterfeit money is hardly consistent with defendant's attempt to establish good character. Finally, Mosley's report of the first offer to the Secret Service is scant support for a claim of entrapment. After hearing the trial court's instructions on entrapment, the jury found defendant guilty.

The record is barren of any showing of entrapment as a matter of law.

We have carefully considered defendant's complaints concerning the trial court's limitation of his cross-examination of Government witnesses and improper comment to the jury in argument by Government counsel. We find such claims of error to be wholly without merit.

The judgment of the district court is affirmed.

Affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

(Judgment sought to be reviewed; entered, June 22, 1964.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is hereby ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

(Conflicting Opinion)

Sherman v. United States, 356 U.S. 370, 78 S.Ct. 819, 2 L.Ed.2d 848.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issue before us is whether petitioner's conviction should be set aside on the ground that as a matter of law the defense of entrapment was established. Petitioner was convicted under an indictment charging three sales of narcotics in violation of 21 U. S. C. § 174. A previous conviction had been reversed on account of improper instructions as to the issue of entrapment. 200 F. 2d 880. In the second trial, as in the first, petitioner's defense was a claim of entrapment: an agent of the Federal Government induced him to take part in illegal transactions when otherwise he would not have done so.

In late August 1951, Kalchinian, a government informer, first met petitioner at a doctor's office where apparently both were being treated to be cured of narcotics addiction. Several accidental meetings followed, either at the doctor's office or at the pharmacy where both filled their prescriptions from the doctor. From mere greetings, conversation progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics. Finally Kalchinian asked petitioner if he knew of a good source of narcotics. He asked petitioner to supply him with a source because he was not responding to treatment. From the first, petitioner tried to avoid the issue. Not until after a number of repetitions of the request, predicated on Kalchi-

nian's presumed suffering, did petitioner finally acquiesce. Several times thereafter he obtained a quantity of narcotics which he shared with Kalchinian. Each time petitioner told Kalchinian that the total cost of narcotics he obtained was twenty-five dollars and that Kalchinian owed him fifteen dollars. The informer thus bore the cost of his share of the narcotics plus the taxi and other expenses necessary to obtain the drug. After several such sales Kalchinian informed agents of the Bureau of Narcotics that he had another seller for them. On three occasions during November 1951, government agents observed petitioner give narcotics to Kalchinian in return for money supplied by the Government.

At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. The issue of entrapment went to the jury,[1] and a conviction resulted. Petitioner was sentenced to imprisonment for ten years. The Court of Appeals for the Second Circuit affirmed. 240 F. 2d 949. We granted certiorari, 353 U.S. 935.

In *Sorrells* v. *United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design

[1] The charge to the jury was not in issue here.

orginates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. (Emphasis supplied.) See 287 U.S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence. See 287 U.S., at 451.

We conclude from the evidence that entrapment was established as a matter of law. In so holding we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

It is patently clear that petitioner was induced by Kalchinian. The informer himself testified that, believing petitioner to be undergoing a cure for narcotics addiction, he nonetheless sought to persuade petitioner to obtain for him a source of narcotics. In Kalchinian's own words we are told of the accidental, yet recurring, meetings, the ensuing conversations concerning mutual experiences in regard to narcotics addiction, and then of Kalchinian's resort to sympathy. One request was not enough, for Kalchinian tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation. Kalchinian not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions.[2] Undoubtedly the impetus for such achieve-

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[2] "Q. And it was your [Kalchinian's] job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?

"A. No, it wasn't my job at all to do anything of the kind.

"Q. Do you remember this question [asked] at the first trial]

"Q. And it was your job while working with these agents to go out and try and induce a person to sell narcotics to you, isn't that correct? A. I would say yes to that.' Do you remember that?

"A. If that is what I said, let it stand just that way.

"Q. So when you testify now that it was not your job you are not telling the truth?

"A. I mean by job that nobody hired me for that. That is what I inferred, otherwise I meant the same thing in my answer to your question." R. 100

ments was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.[3] It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. In his testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make such use of an informer and then claim disassociation through ignorance.

The Government sought to overcome the defense of entrapment by claiming that petitioner evinced a "ready complaisance" to accede to Kalchinian's request. Aside from a record of past convictions, which we discuss in the following paragraph, the Government's case is unsupported. There is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian.[4] The Government's characterization of pe-

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[3] "Q. But you had made a promise, an agreement, though, to cooperate with the Federal Bureau of Narcotics before you received a suspended sentence from the court?

"A. [Kalchinian]. I had promised to cooperate in 1951.

"Q. And that was before your sentence?

"A. Yes, that was before my sentence." R. 99.

Kalchinian received a suspended sentence in 1952 after a statement by the United States Attorney to the Judge that he had been cooperative with the Government. R. 89, 98.

[4] At one point Kalchinian did testify that he had previously received the same amount of narcotics at some unspecified lower price. He characterized this other price as "not quite" the price he paid petitioner. R. 80.

titioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void.[5]

The Government's additional evidence in the second trial to show that petitioner was ready and willing to sell narcotics should the opportunity present itself was petitioner's record of two past narcotics convictions. In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time.

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted.[6] Law enforcement does not require methods such as this.

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[5] It is of interest to note that on the first appeal in this case the Court of Appeals came to the same conclusion as we do as to the evidence discussed so far. See *United States* v. *Sherman*, 200 F. 2d 880, 883.

[6] Cf. *e.g. Lutwak* v. *United States*, 198 F. 2d 760; *Wall* v. *United States*, 65 F. 2d 993; *Butts* v. *United States*, 273 F. 35.

It has been suggested that in overturning this conviction we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells* v. *United States*, 287 U.S. 435, 453. To do so would be to decide the case on grounds rejected by the majority in *Sorrells* and, so far as the record shows, not raised here or below by the parties before us. We do not ordinarily decide issues not presented by the parties and there is good reason not to vary that practice in this case.

At least two important issues of law enforcement and trial procedure would have to be decided without the benefit of argument by the parties, one party being the Government. Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The handicap thus placed on the prosecution is obvious.[7] Furthermore, it was the position of Mr. Justice Roberts that the factual issue of entrapment—now limited to the question of what the government agents did—should be decided by the judge, not the jury. Not only was this rejected by the Court in *Sorrells*, but where the issue has been presented to them, the Courts of Appeals have since *Sorrells* unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of

[7] In the first appeal of this case Judge Learned Hand stated: "Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret." *United States* v. *Sherman*, 200 F. 2d 880, 882.

its function of determining the guilt or innocence of the accused.[*]

To dispose of this case on the ground suggested would entail both overruling a leading decision of this Court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with instructions to dismiss the indictment.

Reversed and Remanded

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[*] For example, in the following cases the courts have, in affirming convictions, held that the issue of entrapment had been properly submitted to the jury. *United States* v. *Lindenfeld*, 142 F. 2d 829 (C.A. 2d Cir.); *United States* v. *Brandenburg*, 162 F. 2d 980 (C.A. 3d Cir.); *Demos* v. *United States*, 205 F. 2d 596 (C.A. 5th Cir.); *Nevo* v. *United States*, 189 F. 2d 515 (C.A. 6th Cir.); *United States* v. *Cirone*, 150 F. 2d 382 (C.A. 7th Cir.); *Louie Hung* v. *United States*, 111 F. 2d 325 (C.A. 9th Cir.); *Ryks* v. *United States*, 183 F. 2d 944 (C.A. 10th Cir.); *Cratty* v. *United States*, 82 U.S. App. D.C. 236, 163 F. 2d 844. And in the following cases the courts have reversed convictions where the issue of entrapment was either not submitted to the jury or was submitted on improper instructions. *United States* v. *Sherman*, 200 F. 2d 880 (C.A. 2d Cir.); *United States* v. *Sawyer*, 210 F. 2d 169 (C.A. 3d Cir.); *Wall* v. *United States*, 63 F. 2d 993 (C.A. 5th Cir.); *Lutfy* v. *United States*, 198 F. 2d 760 (C.A. 9th Cir.); *Yep* v. *United States*, 83 F. 2d 41 (C.A. 10th Cir.).